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No.

in the Supreme Court of the United States

October Term 1989

MAGNUM TOWING, INC. and
RENALDO HERNANDEZ,

Petitioners,

vs.

DADE COUNTY, OFFICER OSCAR DEL MAZO of the Metro-Dade Police Department, and DOLLAR ENTERPRISES, INC. d/b/a Dade Wrecker Service,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

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SUMMARY OF ARGUMENT

REASONS FOR DENYING CERTIORARI

All Respondents in this cause are immune from suits brought pursuant to 42 U.S.C. §1983 in state courts. Respondent Dade County enjoys common law sovereign immunity from such suits as a political subdivision of the

State of Florida. Respondent Officer Oscar Del Mazo enjoys qualified immunity from such suits under the holding of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 1683, 40 L.Ed.2d 396 (1982). Respondent Dollar Enterprises Inc. enjoys both common law sovereign immunity as a "state actor" and qualified immunity pursuant to the holdings of *Sutton v. City of Milwaukee*, 521 F.Supp. 733 (E.D. Wis. 1981) and *Huemmer v. Mayor and City Council of Ocean City*, 632 F.2d 371 (4th Cir. 1980).

Petitioners' first question presented is inapplicable to the facts of this case in that no Fourth Amendment rights were brought into issue by the mere impoundment of Petitioners' vehicle without any gathering of criminal evidence. Petitioners' Fourth Amendment claim is therefore without merit.

Petitioners' Fourteenth Amendment procedural due process claim is similarly without merit because there was no true "deprivation" of property under the facts of this case.

ARGUMENT

I

RESPONDENTS ARE IMMUNE FROM SUIT BROUGHT IN STATE COURT UNDER 42 U.S.C. §1983

A. Dade County. The Florida Supreme Court has held that the State of Florida and its agencies (including Dade County, a political subdivision of the state) are immune from suits brought under section 1983 in state court. *Hill v. Department of Corrections*, 513 So.2d 129, 133 (Fla. 1987), *citing Gamble v. Florida Department of Health and Rehabilitative Services*, 779 F.2d 1509 (11th Cir. 1986) and *Shinholster v. Graham*, 527 F.Supp. 1318 (N.D. Fla. 1981). See also *Spooner v. Department of Corrections*, 514 So.2d 261 (Fla. 5th DCA 1989). Accordingly, and simply, Respondent Dade County, pursuant to its immunity as set

forth in *Hill*, was fully entitled to the judgment granted below.

B. Officer Oscar Del Mazo. Respondent Officer Oscar Del Mazo (Del Mazo) of the Metro-Dade Police Department was also immune from section 1983 liability under the circumstances of this case. Police officers are entitled to qualified immunity from liability under section 1983 unless they violate a clearly established constitutional or federal statutory right of which they knew or should have known at the time of the alleged acts. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 1683, 40 L.Ed.2d 396 (1982). Thus, under the facts of this case, Del Mazo was entitled to immunity unless he knew or should have known that Respondents had a clearly established Constitutional right to be offered alternatives to impoundment because of the existence of a County ordinance allegedly mandating the offering of such alternatives.

It is patently obvious that Respondents had no such clearly established Constitutional right. In *State v. Smith*, 529 So.2d 1226 (Fla. 3d DCA 1988), the Third District Court held that Dade County police officers are not required to offer any alternatives to impoundment of a vehicle, notwithstanding the alleged requirement of Dade County Code section 30-384 that such alternatives be offered. Further, Petitioners themselves argue that the decision in *Colorado v. Bertine*, 479 U.S. 367 (1987), has "caused confusion over whether an 'alternative to impoundment' must be offered when police are not following standardized criteria." (See Petition for Writ of Certiorari, p.7.) Because there was no "clearly established Constitutional right", there was no exception to Del Mazo's qualified immunity, and Del Mazo was entitled to the judgment granted below.

C. Dollar Enterprises, Inc. Respondent Dollar Enterprises, Inc. (Dollar), was likewise immune from section

1983 liability.[1] As set forth above, the State of Florida and its subdivisions have sovereign immunity from section 1983 suits brought in state court. *Hill*, 513 So.2d at 133. Since petitioners argued below that Dollar was a "state actor" for section 1983 purposes (See Petition for Writ of Certiorari, Appendix D), Dollar was immune from section 1983 suits in the state court as well.

In addition, a private towing operator is not liable for section 1983 damages where (a) its role is limited to towing, and not decision making, *Sutton v. City of Milwaukee*, 521 F.Supp. 733 (E.D. Wis. 1981), or (b) when it acts pursuant to a "regularly adopted" ordinance which it has no reason to believe is invalid. *Huemmer v. Mayor and City Council of Ocean City*, 632 F.2d 371 (4th Cir. 1980) (summary judgment in favor of private towing operator is proper even if the activity was state action). Dollar, therefore, like the other Respondents, was entitled to the judgment granted below.

D. Summation: Certiorari Inappropriate. For the foregoing reasons, Certiorari is inappropriate in this instance. As to Dade County, the case below was decided pursuant to state sovereign immunity — there is therefore no need to reach the federal issues raised by Petitioners. As to Del Mazo and Dollar, Petitioners have cited nothing to demonstrate that the Third District Court decided the qualified immunity question in any way that conflicts with the decision of another state court, with the decision of a United States Court of Appeals, or with the applicable decisions of this Court. (See Rule 10, 28 USCA S.Ct. Rules.) Accordingly, the Petition for a Writ of Certiorari should be denied.

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[1]Respondent Dollar Enterprises, Inc. will not be filing a seperate brief in opposition to the Petition as Respondent Dade County has indemnified Respondent Dollar Enterprises, Inc.

II

THE FOURTH AMENDMENT IS NOT IMPLICATED IN THIS CASE

Respondents argued to the Third District Court, and repeat their argument here, that this case does not involve Fourth Amendment rights. Petitioner Renaldo Hernandez (Hernandez) is not contesting the validity of his arrest. Although the towing of a vehicle may be a seizure within the meaning of the Fourth Amendment under certain circumstances, that amendment is implicated only when the seizure results in the discovery of criminal evidence. The factual situation of the instant case is not what the drafters of the Fourth Amendment were concerned with; indeed, the entire amendment, when read in its full context, makes clear that "seizure" refers to items taken pursuant to a search. The Fourth Amendment is simply not relevant to the present case.

It is not surprising, therefore, that Petitioners cite no cases whatsoever to support the proposition that the mere impoundment of a vehicle subsequent to a driver's arrest, without obtaining criminal evidence to be used against the driver, constitutes an "unreasonable seizure" within the meaning of the Fourth Amendment. The one case relied upon by Petitioners in making their "Fourth Amendment" argument, *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), is concerned only with the admissibility of evidence discovered during an inventory search of Bertine's vehicle. In fact, the section of *Bertine* quoted by Petitioners on page 9 of their Petition is quoted completely out of context. The full quotation in context reads as follows:

> Bertine finally argues that the **inventory search** of his van was unconstitutional because departmental regulations gave the police discretion to choose between impounding his van and parking

> and locking it in a public parking place. The Supreme Court of Colorado did not rely on this argument in reaching its conclusion, and we reject it. Nothing in Opperman or Lafayette prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than **suspicion of evidence of criminal activity.** Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to **investigate suspected criminal activity.** (Emphasis added.)

Colorado v. Bertine, 479 U.S. at 375-76.

There has been no allegation in the instant case that Respondents chose to impound Petitioners' vehicle in order to investigate suspected criminal activity. Petitioners have never alleged an improper search of their vehicle. *Bertine* and its related cases are irrelevant to the factual situation at hand. Petitioners, therefore, have clearly fallen short of showing that the Third District Court decided the "Fourth Amendment question" in a way that conflicts with any other Court, and their Petition should be denied.

III

RESPONDENTS DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS

Initially, as argued by Respondents to the Third District Court, it is obvious that Hernandez had no Fourteenth Amendment claim because he had no ownership interest in the tow truck. Further, as also argued by Respondents to the Third District Court, there was not a true "deprivation" of the tow truck to begin with.

Petitioners were offered the opportunity, and refused, to have their vehicle released by signing an owner/driver release form waiving liability on the part of Dade County for the vehicle if it were left in place. (See Petition for Writ of Certiorari, pp. 3-4.) Petitioner Magnum Towing Inc. (Magnum) could not contend, therefore, that its property was involuntarily taken from it. Any right Magnum may have had to retain possession of its vehicle was waived by its driver's refusal to sign the owner/driver release form.

Petitioners have cited no cases that conflict with a holding that the facts of this case establish no Fourteenth Amendment deprivation. The Petition for a Writ of Certiorari should therefore be denied.

CONCLUSION

For the reasons stated and upon the authorities cited, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert A. Ginsburg, a member of the bar of this Court, hereby certify that on the day of April, 1990, three copies of this Brief in Opposition to Petition for a Writ of Certiorari were served by U.S. Mail by depositing same in a U.S. mailbox, with first class postage prepaid, addressed to ROBERT M. JASINSKI, ESQUIRE, at The Roney Plaza, Suite M-8, 2301 Collins Avenue, Miami Beach, FL 33131, attorney for Petitioners and to Andrew L. Salvage, Esquire, One CenTrust Financial Center, 100 S.E. Second Street, Miami, Florida.

_____

Dade County Attorney